Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

TERI LYONS,

Petitioner,

v.

WILLIE WILLIAMS, MAURICE MOORE, CITY OF LOS ANGELES, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Who bears the burden of proof on the issue of consent, when consent is pled as an affirmative defense to a Fourth Amendment excessive force claim based on rape of a female under 42 U.S.C. 1983?

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PETITION FOR WRIT OF CERTIORARI

Teri Lyons, a female, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals (App. A, 1a-10a) was rendered on August 2, 1996, and it is reported at 91 F.3d 1308.

JURISDICTION

The judgment of the Court of Appeals was rendered on August 2, 1996, a timely petition for rehearing with a suggestion for rehearing *en banc* was made and was rejected on August 30, 1996, and this Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

Petitioner Teri Lyons (Lyons) alleged she was subjected to excessive force by rape by Los Angeles Police Department commander respondent Maurice Moore (Moore) in violation of her Fourth Amendment right not to be subjected to an unreasonable seizure of her person, and her Fourteenth Amendment right to liberty. She sued Moore under 42 U.S.C. 1983.

Moore refused to respond to Lyons' claim and invoked the right against self-incrimination, but later admitted he used the force claimed by Lyons to have been used, and pled the affirmative defense of consent.

The action went to trial, and the district court refused Lyons' timely request to instruct the jury that Moore bore the burden of proof on his affirmative defense of consent, and, over Lyons' timely objection, the district court instructed the jury that Lyons bore the burden to prove there was no consent to Moore's use of force against Lyons.

The jury returned a verdict against Lyons.

Lyons timely filed a notice of appeal, and the United States Court of Appeals for the Ninth Circuit, ignoring and not mentioning its own controlling precedent, set forth in *Larez v. Holcomb*, 16 F.3d 1513 (9th Cir. 1994), that in Fourth Amendment actions consent is an affirmative defense that must be proved by the defendant, held that, because the force admittedly used consisted of sexual intercourse, the criminal law burden of proof standard applied, and Lyons bore that burden.

The court held that lack of consent is an element of the crime of rape, and that therefore, Lyons bore the burden of proving she did not consent to Moore's sexual intercourse with her.

REASONS FOR GRANTING THE PETITION

1. The court below trivialized both the right of a woman not to be subjected to excessive force and not to

be raped under color of law, and also supplanted long-standing precedent (that provides the affirmative defense of consent must be proved by the party who claims it) with state law principles of battery and criminal law that are inconsistent with federal law on the same topic.

2. There is a significant conflict of law between the Ninth Circuit and eight other circuit courts of appeals on the issue of who bears the burden of proof on the element of consent in federal, Fourth Amendment cases.

I

THE COURT BELOW TRIVIALIZED BOTH THE RIGHT OF A WOMAN NOT TO BE SUBJECTED TO EXCESSIVE FORCE UNDER COLOR OF LAW AND NOT TO BE RAPED UNDER COLOR OF LAW, AND ALSO SUPPLANTED LONG-STANDING PRECEDENT, THAT PROVIDES THE AFFIRMATIVE DEFENSE OF CONSENT MUST BE PROVED BY THE PARTY WHO CLAIMS IT, WITH COMMON LAW PRINCIPLES OF BATTERY AND INAPPOSITE CRIMINAL LAW THAT ARE INCONSISTENT WITH CONTROLLING FEDERAL LAW ON THE SAME SUBJECTS.

The court below both turned this federal civil rights action into a state law tort action, and turned it into a criminal action, by mis-allocating the burden of proof on the issue of consent to petitioner, and by relieving respondent from his burden of proof on his affirmative defense of consent.

The court below did the former by holding that since, under the Restatement (Second) of Torts "absence of consent is a matter essential to the cause of action [of battery] . . . it must be proved by the plaintiff as a necessary

part of [her] case[,]" 91 F.3d at 1311, and accomplished the latter by citing the "standard jury instructions for *criminal* rape in California [which] require the prosecution to prove that 'the act of intercourse was against the will' of the alleged victim. CALJIC 10.00 (1995)." *Ibid.* (emphasis added).

From these principles and category mistakes (never identified or argued by respondent, never briefed by anyone, and never mentioned at all in oral argument), the court below jumped to the "[a] fortiori [conclusion that] where the alleged rape was the centerpiece of a claimed violation of civil rights, it was the burden of the plaintiff to prove every element of the alleged violation. The district court accurately so charged the jury." *Ibid.* Far from being a stronger or more conclusive basis for its conclusion that the burden of proof on the issue of consent is on petitioner, the category mistake of the court below is illogical, because it supplants federal constitutional law with state tort law, and also supplants civil law with criminal law.

Nineteen years ago, this Court correctly characterized the horror and degradation of rape as, "[s]hort of homicide, . . . the ultimate violation of self." *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

The creation by the court below of an exception to the longstanding, controlling principles which have governed both affirmative defenses and placement of the burden of proof in Fourth Amendment cases, only for women who base their claims of use of excessive force on rape by persons who act under color of law, is both

wrong and perverse. Women who have been raped cannot be the only civil rights plaintiffs who allege excessive force was visited on them, and who then must prove the force used against them was not consensual. No other category of plaintiff in Section 1983, Fourth Amendment cases has the burden of proving a defendant's affirmative defense or consent, and women cannot be the only parties who will populate this class.

Long ago, it authoritatively was stated that consent to a beating is a matter of defense.

> [The law of pleading] will inform A that he need persuade the tribunal of two facts only, namely, that A was beaten and it was B who beat him; and that, upon persuading the tribunal of these facts, its action will be taken in his favor. . . . It will inform B that at this point the risk of non-action will turn upon him, in the sense that he needs the tribunal's action in order to relieve himself from the consequences of its previous action, and that this action . . . will depend upon his persuading the tribunal as to certain specified facts by way of excuse or justification.

Wigmore on Evidence, 2d ed., 1923, vol. 5, § 2485, p. 439. Thus, in a battery case, all a plaintiff needs to prove is that there was a battery, and that defendant committed the battery; and, it falls upon the defendant to carry the burden of persuasion on issues of excuse or justification. The affirmative defense of consent pled by respondent is a paradigm defense of excuse or of justification, and therefore, it must have been proved by respondent.

> [I]n most actions of tort there are many possible justifying circumstances, – self defense, leave and license, 'volenti non fit injuria,' and the like;

> but it would be both unfair and contrary to experience to assume that one of them was probably present, and to require the plaintiff to disprove the existence of each one of them; so that the plaintiff is put to prove merely the nature of his harm, and the defendant's share in causing it; and the other circumstances, which would if they existed leave him without a claim, are put upon the defendant to prove.

Ibid. at § 2486, p. 441. This principle is recognized today in the concept that

> [a] plaintiff is not required to deal with every element which might conceivably affect the decision of the case. On the contrary, the elements are allocated between the parties so that plaintiff is entitled to recover if he establishes certain selected elements comprising a "claim for relief," unless defendant establishes another element called "affirmative defense."
>
> . . . .
>
> [T]he complaint, the vehicle employed to satisfy plaintiff's burden of pleading, will set forth the elements of plaintiff's claim for relief . . . ; the answer contains affirmative defenses. . . .

Graham, Handbook of Federal Evidence, § 301.2, pp. 90-91 (3d ed. 1991). Petitioner properly pled in her complaint that respondent used excessive force against petitioner, and respondent pled the affirmative defense of consent. Thus, it properly was respondent's burden to prove *his* affirmative defense of consent. To have stated a claim against respondent, all plaintiff was required to plead (and, to prove) were two, and only two elements: (1) violation of a federally-protected right, and (2) action

under color of state law. *See, e.g., Gomez v. Toledo*, 446 U.S. 635, 640 ("defendant must plead any "matter constituting an avoidance or affirmative defense.' ") (1980) (quoting Rule 8[c], F.R. Civ. P.).

Notwithstanding this Court's precatory words that Section 1983 should be read in harmony with traditional tort defenses and immunities, *see Imbler v. Pachtman*, 424 U.S. 409, 418 (1976), it long has been established, and is the law, that state law immunities may *not* be defenses to federal civil rights claims, *see, e.g. Martinez v. California*, 444 U.S. 277, 284 n. 8 (1980) (to construe a federal statute to allow a state immunity defense "to have controlling effect would transmute a basic guarantee into an illusory promise"), and that is so even in the Ninth Circuit. *See, e.g., Guillory v. County of Orange*, 731 F.2d 1379, 1382 (9th Cir. 1984) ("State statutory immunity provisions do not apply to federal civil rights actions."); *Morrison v. Jones*, 607 F.2d 1269, 1273 (9th Cir. 1979) (same), *cert. denied*, 445 U.S. 962 (1980). The *a fortiori* principle, applied correctly, compels that neither state tort law nor principles of criminal law may be used to supplant, respectively, either federal law on the same subject, or federal civil law on the same subject. Yet, that is precisely what the court below did.

Even in instances in which principles of state law are assimilated into Section 1983 jurisprudence under 42 U.S.C. 1988, this may be done only when the principles of state law are in accord with and are not inconsistent with federal law. *Robertson v. Wegmann*, 436 U.S. 584, 585 (1978).

"Affirmative defenses" are those "matter[s] constituting an avoidance" of the claims asserted. F.R. Civ. P.

(West 1996) Rule 8(c). In federal Fourth Amendment cases, consent is an affirmative defense. *Bumper v. State of North Carolina*, 391 U.S. 543, 548 (1968).

Affirmative defenses generally must be proved by those who assert them, *see, e.g., Rosenbloom v. Metromedia, Inc.* 403 U.S. 29, 38 (1971) (in defamation actions, burden of proof of affirmative defenses rests with defendant), and affirmative defenses in federal civil rights actions must be proved by defendants who assert them. *Harlow v. Fitzgerald*, 475 U.S. 800, 819 (1982) (qualified immunity defense must be proved by defendant who asserts it).

More fundamentally, the concept of "burden of proof should be limited to burden of persuasion," and " 'the party whose case requires the proof of [a] fact, has all along the burden of proof.' " *Director, Office of Workers' Compensation Programs, Department of Labor v. Maher Terminals, Inc.*, 512 U.S. 267, ___, 114 S.Ct. 2251, 2255 (1994). "The only time the burden of proof . . . might shift is in the case of affirmative defenses." *Ibid.* Here, it is not petitioner whose case requires proof of lack of consent, but it is respondent whose case requires proof of consent, and this principle is consistent with the maxim that one does need to prove the affirmative of an issue, but one is not ordinarily required to prove the negative of an issue.

"[C]onsent . . . is a matter which the Government has the burden of proving [in Fourth Amendment cases,]" *United States v. Mendenhall*, 446 U.S. 544, 557 (1980), and "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required. . . . " *Patterson v. New York*, 432 U.S. 197, 210 (1977). "When [one] seeks to rely upon consent to justify the lawfulness of [conduct

governed by the Fourth Amendment], he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper, supra,* 391 U.S. at 548. When conduct governed by the Fourth and Fourteenth Amendments is sought to be "justif[ied] . . . on the basis of consent, the Fourth and Fourteenth Amendments require that [the party who seeks to justify the conduct] demonstrate that the consent was in fact voluntarily given and not the result of duress or coercion, express or implied." *Schneckloth v. Bustamonte,* 412 U.S. 218, 248 (1973).

(Eight circuit courts of appeals, excepting the Ninth Circuit, all take the view that consent is a matter for proof by the party who asserts consent as a defense to or justification for action he or she took. *See infra* at section II.)

Because lack of consent is *not* part of a federal civil rights claim for use of excessive force, notwithstanding that lack of consent may be an element of common law battery, and because there is no requirement that one who has been subjected to excessive force by means of rape is required to prove, in a federal civil rights action founded on alleged violations of the Fourth and Fourteenth Amendments, an additional element of her claim – that she did not consent to the forced sexual intercourse – it was respondent's burden to prove his affirmative defense of consent. Therefore, it was erroneous for the district court to place respondent's burden on petitioner, and for the court below to affirm that decision.

The erroneous placement on petitioner of the burden of proof on the issue of consent, in disregard of the

court's own binding precedent in *Larez v. Holcomb, supra* (indeed, though this case was cited to the court below, it neither mentioned it nor sought to distinguish it), warrants granting certiorari because "the burden of proof affects all aspects of the jury's verdict and . . . it is impossible to determine whether [an] erroneous burden of proof [instruction is] outcome determinative." *Carvahlo v. Raybestos*, 794 F.2d 454, 455 (9th Cir. 1986). This is especially true in this case. Consent was the only issue before the jury. The outcome on this issue necessarily was determined by the assessment of the credibility of the petitioner and of the respondent. Because the jury was instructed that petitioner had to prove lack of consent, very obviously this issue was outcome-determinative.

> [A] court commit[s] reversible error by instructing the jury that plaintiff ha[s] the burden of proof on all elements of the cause of action without instructing that [defendant] ha[s] the burden of proving [matters on which the defendant has the burden of proof].
>
> . . . .
>
> [A] district court err[s when] the instructions . . . d[o] not fairly inform the jury that [defendant] ha[s] this burden.
>
> . . . .
>
> This error [of putting the burden of proof on the wrong party is] not harmless.

Ibid.

Because the petitioner, contrary to controlling law, was required to prove the nonexistence of consent, certiorari should be granted.

II

THE CONFLICT OF LAW AMONG THE CIRCUITS WARRANTS THE GRANTING OF CERTIORARI.

There is a conflict among the circuit courts of appeal on the issue of who has the burden of proof on the issue of consent, and that conflict warrants the granting of certiorari in order to bring into compliance with both controlling law and the weight of authority the Ninth Circuit. The First, Second, Third, Sixth, Seventh, Eighth, Tenth, and District of Columbia circuit courts of appeals all have held that in Fourth Amendment cases consent is a matter that must be proved in defense of claims that the Fourth Amendment has been breached.

In *Murray v. United States*, 292 F.2d 602, 604 (1st Cir. 1961), it was held that "the burden of proof on the issue of consent . . . should be on the defendant [who pled it]." This was a taxpayer action for refund in which the defendant pled consent as a defense.

In *Rosenfeld v. Curtis Publishing Co.*, 163 F.2d 660, 663 (2d Cir. 1947), a defamation action, it was held that "the defendant . . . [must] prove[ ] consent[,]" because consent was part of its defense.

In *Edwards v. City of Philadelphia*, 860 F.2d 568, 570 (3d Cir. 1988), a Section 1983 excessive force case, the court accepted the contention that "privilege to use force in

making an arrest is an affirmative defense to the tort of battery that underlies the 1983 claim and, as with other affirmative defenses, the burden of proving that defense is on the party who invokes it[,]" though the burden of proof on the ultimate issue of excessive force always remains with the plaintiff.

In *United States v. Cook*, 915 F.2d 250, 252 (6th Cir. 1990), it was held that "where voluntary consent to search is alleged by the government, it is important to remember that the government bears the burden of proof on this issue. . . . "

In *Tyson v. Trigg*, 50 F.3d 436, 447-48 (7th Cir. 1995), professional boxer Mike Tyson's habeas corpus petition on his conviction for rape, the court held that "[i]n a situation of alleged 'date rape,' the alleged rapist may have thought the woman was consenting to have sex with him, though she was not. . . . [A] criminal defendant has a constitutional right to present witnesses in support of whatever defenses to the offense with which he is charged state law creates." Thus, contrary to the disposition of the court below, in Indiana at least, in a criminal rape case, consent is a defense, and is not part of the offense, when it is asserted, as it is here, as a defense.

In *United States v. Kampbell*, 574 F.2d 962, 963 (8th Cir. 1978), the court held that "[t]he government, in seeking to rely on Kampbell's consent, 'has the burden of proving that the consent was, in fact, freely and voluntarily given.' " (Quoting *Bumper, supra.*)

In *United States v. Bazinet*, 462 F.2d 982, 989 (8th Cir. 1972), the court held that "[t]he government has a heavy

burden of proof in establishing that the consent was [a] voluntary act. . . . "

In *United States v. Zapata*, 997 F.2d 751, 758 (10th Cir. 1993), the court held that "[w]e determine the voluntariness of . . . consent . . . with the government bearing the burden of proof." *See also, United States v. Manuel*, 992 F.2d 272, 275 (10th Cir. 1993); *United States v. Recalde*, 761 F.2d 1448, 1453 (10th Cir. 1985).

In *Graham v. Davis*, 880 F.2d 1414, 1418 (D.C. Cir. 1989), the court held that there is a "defense of consent" in Section 1983 excessive force cases.

The Ninth Circuit's disposition of this case is in conflict with cases from eight other circuit courts of appeals, all of whom agree that in Fourth Amendment cases consent is a defense.

In order to resolve the conflict among the circuits, certiorari should be granted.

III

CONCLUSION

For the reasons set forth, and because the court below got it seriously wrong by fashioning a new, incorrect rule governing the burden of proof, but only for women who claim they have been subjected to excessive force by rape, this Court should grant certiorari.

Respectfully submitted,

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APPENDIX A

Teri LYONS, Plaintiff-Appellant,

v.

Willie WILLIAMS, Police Chief; Daryl Gates, Former Police Chief of LAPD; Bernard Parks; Maurice Moore; Dan Miller; Connie L. Castruita; Maurice Moore, Defendants-Appellees.

No. 94-55454.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 9, 1996.

Decided Aug. 2, 1996.

Stephen Yagman, Marion R. Yagman, Yagman & Yagman, Venice, California, for plaintiff-appellant.

Barry Levin, James K. Hahn, Frederick N. Merkin, George R. Lomeli, Los Angeles, California, for defendants-appellees.

Appeal from the United States District Court for the Central District of California, William M. Byrne, Jr., District Judge, Presiding. D.C. No. CV-92-7419-WMB.

Before: BEEZER, BRUNETTI, and JOHN T. NOONAN, Jr., Circuit Judges.

JOHN T. NOONAN, Jr., Circuit Judge:

Teri Lyons appeals the judgment of the district court in her civil rights action under 42 U.S.C. § 1983 against

Maurice Moore, an officer of the Los Angeles Police Department (LAPD), the City of Los Angeles and seventeen officials of the city. The heart of her appeal is the argument that the burden of proof in a civil suit alleging rape should be on the defendant to prove consent. Rejecting this novel contention, we affirm the district court.

FACTS

Lyons has been an officer of the LAPD since 1982. She had been engaged largely in narcotics work and in 1991 was a member of the DARE Division, where she taught the DARE anti-drug program to elementary and junior high school children and trained other DARE officers. Toward the end of 1991 and the beginning of 1992, she had difficulties with her supervisor, was forced out of the training team and was limited to teaching in the schools. During the same period she had problems with her husband, who was also an officer in the LAPD.

In this period, late 1991 to early January 1992, she began telephoning anonymously an assistant chief of police in the Operations Central Bureau of the LAPD. The primary topic of the calls was her concern about her career. In March 1992 one of her calls was intercepted by Maurice Moore, with whom she also discussed her career problems. Moore was a 33-year veteran of the LAPD with the rank of Commander. A week later Lyons called Moore again and told him that her aunt and uncle knew him and that he might guess who she was. She then talked to him about her marital problems. Moore encouraged her to see the LAPD psychiatrist. Lyons called Moore a third time. Moore told her that he would feel more comfortable

talking to her in person at his apartment. She got his home telephone number from her aunt.

By mutual agreement, after work on the evening of March 31, 1992, Lyons met Moore at his apartment building and accompanied him to the living room of his apartment. He discussed the problems he was having with his wife, from whom he was separated. She discussed her marital problems. After some period of conversation they entered Moore's bedroom and engaged in sexual intercourse. After Lyons left the apartment they never had a conversation again. The next day, however, Moore left the name and number of a family counselor on Lyons's voice mail. According to Moore, Lyons left six messages on Moore's recorder, each stating, "I was thinking about you" or words to that effect.

In April 1992, Lyons again telephoned the assistant police chief at the Operations Control Bureau and talked anonymously with him about her career and her marital problems. This officer was Moore's superior, but she did not mention Moore. In November 1992, she again telephoned the assistant police chief, revealed her name, and asked if they could meet. No meeting, in fact, took place, and no mention was made of Moore. Later in the month Lyons told a field supervisor in the DARE Division that she was under stress, that she was dissatisfied with her job, and that Moore had taken advantage of her vulnerability and that she felt like she had been raped. This conversation was reported to the supervisor's superior. The same day she was interviewed on the subject of the alleged rape at a police station. The LAPD then investigated her allegations. Moore admitted that he and Lyons

had engaged in intercourse but denied that he had raped her.

PROCEEDINGS

On December 17, 1992, Lyons filed a complaint in federal court alleging in count 1 that, in violation of the Fourth Amendment as incorporated by the Fourteenth Amendment, she had been subjected to the use of excessive force by Moore; in count 2 that she had been deprived of her rights to due process; and in count 3 that she had been "physically raped and thereby illegally assaulted and battered." She sought general damages in the sum of $10 million and punitive damages in the sum of $10 million. Named as defendants were Moore, the City of Los Angeles and seventeen officials of the City of Los Angeles who were alleged to have taken no action to investigate the reported rape or to discipline Moore.

The district court bifurcated the action and permitted the case against Moore and the city to go to a jury trial that lasted five days. In addition to her own testimony that she had not consented to intercourse, Lyons presented as witnesses Moore, who was adverse, and, as an expert witness, Kathleen M. Bartle-Schulweis. Bartle-Schulweis had a bachelor's and master's degree in sociology from the University of California at Los Angeles and a degree in business from the University of Southern California. At the time of trial she was finishing a doctoral dissertation at UCLA on the subject of sexual harassment. She held a certificate from the Rosa Parks Sexual Assault Crisis Center, certifying that she had participated in a one week course in rape counselling. She

testified that she had "worked with over 400 rape survivors," that is, persons saying that they had been raped. Bartle-Schulweis assumed that the persons complaining to her were telling the truth. She had never done any studies as to the false reporting of rape. She had published no scholarly study on acquaintance rape or rape in general. She was not a psychologist. The defense challenged her qualifications to be an expert in the case. The court observed that her qualifications were "minimal," but agreed that she could testify as an expert to reluctance and delay in reporting acquaintance rape.

Lyons sought to obtain Bartle-Schulweis's answers to 142 questions relating chiefly to the reaction of rape victims to the trauma they had undergone. The court found only two of these questions to be relevant and within Bartle-Schulweis's expertise and permitted these questions only. The principal question permitted was: whether women who were the victims of acquaintance rape are more likely to make delayed or late reports than women who were victims of stranger rape. Bartle-Schulweis testified that they were.

Lyons submitted an instruction on consent that read as follows:

> Consent must be voluntary and not the result of coercion. Defendant Moore has the burden of demonstrating that consent to the sexual intercourse was voluntary. However, as to plaintiff Lyons' claim under federal law, that Moore allegedly violated Lyon's federal right, as defined in these instructions, plaintiff Lyons at all times has the ultimate burden of proving to the jury that defendant Moore violated that

> right and acted under color of law. Plaintiff Lyons does not have the ultimate burden as set forth in the immediately preceding sentence of this instruction, with respect to her separate claim under State law that Moore committed a sexual battery against plaintiff Lyons, and plaintiff Lyons is entitled to a verdict in her favor on her State law claim unless defendant Moore proves plaintiff Lyons voluntarily consented to the admitted sexual intercourse.

The court declined to give this instruction. As to the federal civil rights claim, the court charged that Lyons must prove:

> First, the defendant had sexual intercourse with plaintiff without the consent of plaintiff.
>
> Second, that the defendant then and there acted under color of authority of the state or local law.
>
> Third, that the defendant's acts were the proximate cause of injuries or damages sustained by the plaintiff.

As to the battery, the court charged that Lyons must prove:

> As to the state law claim, plaintiff has the burden of establishing by a preponderance of the evidence the three essential elements for a claim of battery.
>
> First, that the defendant intentionally did an act which resulted in a harmful or offensive contact with the plaintiff's person.
>
> Second, that the plaintiff did not consent to the contact.

> Third, the harmful or offensive contact caused injury, damage, loss or harm to the plaintiff.

The jury returned a verdict for Moore. The court entered judgment for Moore and for the city. On April 11, 1994, the court granted summary judgment for the seventeen city officials, finding that Lyons had not produced any evidence that supported their liability as individuals or in an official capacity.

Lyons appeals.

ANALYSIS

The Instruction On Consent

Lyons argues that consent is an affirmative defense to a charge of rape, and, therefore, the district court erred in placing the burden of proof as to consent on her. This argument misconceives her case. In every action alleging an unlawful touching of one's person the lack of consent to the touching is part of the plaintiff's case. "[T]he absence of consent is a matter essential to the cause of action [of battery], and it is uniformly held that it must be proved by the plaintiff as a necessary part of [her] case." *Restatement (Second) of Torts* § 13 cmt. d (1965). What is true of ordinary battery is equally true of the gross, intimate and odious touching against one's will that constitutes rape. For that reason, the standard jury instructions for criminal rape in California require the prosecution to prove that "the act of intercourse was against the will" of the alleged victim. CALJIC 10.00 (1995). Where an act of rape forms part of a civil cause of action, the nature of the act to be proved is not altered.

What the plaintiff has to show is intercourse against her will or without her consent. The burden is hers. The tort analogous to rape in California is sexual battery. Cal.Civ.Code § 1708.5 (West 1996). Proof of it requires that "plaintiff did not consent to the contact." BAJI No. 7.56 (8th Ed.1994). A fortiori, where the alleged rape was the centerpiece of a claimed violation of civil rights, it was the burden of the plaintiff to prove every element of the alleged violation. The district court accurately so charged the jury.

The Limitation on the Expert's Testimony

Bartle-Schulweis was accepted as an expert on a very narrow subject: the reporting of acquaintance rapes. It is not entirely clear that she was qualified to be an expert on this subject since no evidence was offered as to her knowing whether the rapes she said were delayed in their reporting had actually taken place or were merely the allegations of the victim; she assumed that the allegations were true and had no experience of observing the false allegation of rape. In any event, she was permitted to testify as to the phenomenon of delay in such reports and in this way bolstered the credibility of Lyons. There were a large number of other questions that she was not permitted to answer such as: "Do rape trauma systems cause tremendous disruption in the victim's life?" "Is it true that rape victims often say 'I feel like I'm going crazy.' " And, "Do eventually, almost all victims move into another stage characterized by acute distress?" The relevance of these questions has not been shown, nor has Lyons pointed to any prejudice resulting from the district court's refusal to permit examination on these points.

Execution of Moore's Invocation of the Privilege Against Self Incrimination

In the first stage of the police investigation of his conduct, Moore invoked the privilege against self-incrimination. Ten days later he fully answered all interrogatories in the investigation and testified fully at his deposition in this case. The district court did not err in excluding as more prejudicial than probative evidence of his initial invocation of the privilege.

Other Questions

Defense counsel was instructed in limine not to ask Lyons about her marital problems. He did ask her to relate the conversation with Moore in which the two of them discussed their respective marital problems. Lyons had already repeatedly testified about these problems on direct examination by her own counsel. The door to cross-examination on the conversation had been opened.

A single question, "It is true, is it not, that your aunt in fact denied providing to you defendant Moore's telephone number," was not proper when there was no evidence that the aunt did deny providing it. The court admonished the jury to ignore this question and response. The question was not harmful.

Lyons objected to the presence in the courtroom of Connie Castruita, a defendant and an investigator for the defense who had conducted a number of interviews with Lyons. Counsel stated that Castruita would testify only if "it becomes necessary to impeach something that Teri Lyons told Miss Castruita." It was not an abuse of discretion to permit her to remain in the courtroom.

The Judgments for the City and its Officials

Lyons presented no evidence before summary judgment against her that the particular officials had authorized or approved a policy to deprive a person of rights against rape by a police officer. The verdict for Moore removed any possible liability of the city.

AFFIRMED.